No. 80-1389

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In the Supreme Court of the United States

OCTOBER TERM, 1980

GAETANO ALESSANDRELLO AND SALVATORE LACOGNATA, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, in the circumstances of this case, petitioners' exclusion from a portion of the jury voir dire constituted harmless error.

2. Whether the federal bank robbery statute, 18 U.S.C. 2113, prohibits an extortionate scheme under which bank funds are demanded as ransom for a hostage.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-45) is reported at 637 F. 2d 131.

JURISDICTION

The judgment of the court of appeals was entered on November 21, 1980. A petition for rehearing was denied on December 19, 1980 (Pet. App. A-46). The petition for a writ of certiorari was filed on February 17, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the District of New Jersey, petitioners were convicted of conspiracy to commit bank robbery, in violation of 18 U.S.C. 371, using force and violence to rob a bank, in violation of 18 U.S.C. 2113(a), taking money from a bank with the intent to steal it, in violation of 18 U.S.C. 2113(b), and forcing a person to accompany them during the commission of these offenses, in violation of 18 U.S.C. 2113(e). They were sentenced to concurrent terms of five years' imprisonment on the conspiracy count and 21 years' imprisonment on the substantive counts (Pet. App. A-3, A-4). The court of appeals affirmed in a divided opinion (*id.* at A-1 to A-45).

1. The evidence at trial showed that petitioners, aided by co-defendants Jose Fonseca-Vasquez (Fonseca), Guillermo Caceres-Novella (Caceres), and Angel Cedeno-Echeverria (Cedeno),[1] kidnapped Joan Dedrick, the wife of the vice-president of the Franklin National Bank in Paterson, New Jersey, on July 20, 1979, and released her on July 22 after receiving $217,000 from the bank in ransom (Pet. App. A-3 to A-4).

Caceres, Fonseca, and Cedeno kidnapped Mrs. Dedrick from her home on the morning of July 20. They first blindfolded, bound, and gagged her. They then carried her in a box from her home to Cedeno's apartment (Pet. App. A-3; C.A. App. 123a-125a, 419a-421a). There they met petitioners. Petitioner Lacognata asked Mrs. Dedrick for her husband's work telephone number and told her to tell her husband to follow his orders (Pet. App. A-3; C.A. App. 129a, 263a-264a, 421a). Mrs. Dedrick spoke to her husband

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[1] Fonseca, who pleaded guilty to bank robbery and conspiracy prior to trial, testified for the government. Caceres and Cedeno pleaded guilty to the same charges on the third day of trial (Pet. App. A-2 n.1).

briefly, telling him to do as the men said. Lacognata then took the telephone and told Dedrick to obtain $150,000 in small, unmarked bills and deliver it to a telephone booth across the street from the bank in 15 minutes (Pet. App. A-3; C.A. App. 129a, 275a-277a). Dedrick did so; he received a call at the phone booth directing him to another booth in Paterson (Pet. App. A-3). There he was approached by three Paterson detectives. In five or ten minutes, the same caller told Dedrick that there were too many police nearby. Dedrick then returned to the bank (*ibid.*; C.A. App. 278a-281a).

Shortly before 4:00 p.m., Lacognata again called Dedrick at the bank and instructed him to get $300,000. When Dedrick protested that the bank did not have that much money, Lacognata threatened to kill Dedrick's wife (Pet. App. A-3; C.A. App. 289a-290a). Dedrick waited all night for further directions, but no call came.[2]

The next day, Dedrick received another call from Lacognata. Pursuant to the latter's directions, Dedrick took a suitcase containing $217,000 to a telephone booth in New York City (Pet. App. A-3 to A-4). There Dedrick received a call directing him to yet another phone booth. After a series of similar calls, Dedrick was directed to return to New Jersey, where he was told to leave the money in a wooded area in Fort Lee (*id.* at A-4). Petitioners and Fonseca picked up the money later that night, and Mrs. Dedrick was ultimately released, still blindfolded, at approximately 4:00 a.m. on July 22 (*ibid.*; C.A. App. 137a-139a, 459a-462a). Petitioners were arrested a short time later.

2. The jury selection at petitioners' trial was conducted in two phases. The first portion, comprising 80-85% of the

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[2]He later learned that the electricity had accidentally been turned off in the building that evening (C.A. App. 313a-314a).

voir dire, took place in open court. The trial judge first addressed the pool of 80 prospective jurors. He explained the basic workings of a criminal trial, advised them of the government's burden of proof, and explained the indictment (Pet. App. A-4). He then placed 16 prospective jurors in the jury box and, after each juror provided background information about himself, the judge posed to the group of jurors several questions designed to determine whether they were impartial (*id.* at A-4 to A-5). The court also explained concepts such as the presumption of innocence and proof beyond a reasonable doubt, and questioned the prospective jurors to determine whether they would follow these principles (*id.* at A-5). After advising the panel of the strictures of the trial schedule and the requirements of sequestration, the court retired to a small anteroom for the second phase of the voir dire (*id.* at A-5 to A-6).

This second phase focused on the prospective jurors' exposure to pretrial publicity. The court examined each juror individually in order to preclude one juror's saying something that might taint the entire panel (Pet. App. A-6). Because of the small size of the room, the four defendants were not present, though their attorneys were (*ibid.*). The court advised defense counsel that they were free to consult with their clients, who were about 25 feet away, as often as they wished (*ibid.*). The court then examined the 16 prospective jurors concerning their exposure to publicity; each juror was given the opportunity to request that he be excused from jury service for personal hardship reasons. After this was completed, the court and counsel returned to the courtroom. The above procedure was repeated as two more groups of 16 were examined (*id.* at A-6 to A-7). After some 40 persons were passed for cause, the government and defense counsel informally agreed upon a panel of 16 to sit as jurors and alternates (*id.* at A-7).

3. On appeal, petitioners argued that their exclusion from the portion of the voir dire in which prospective jurors were

questioned individually regarding pretrial publicity constituted reversible error. The court of appeals held that the exclusion violated Rule 43(a), Fed. R. Crim. P. The majority found, however, that the error was harmless because the portion of the examination in question involved only one topic, and petitioners had had an opportunity to observe the prospective jurors as they responded to questions about their background as well as other matters; petitioners' lawyers were present and were permitted to consult with petitioners at any time; and petitioners and counsel were free to consult before the actual selection of the jury members (Pet. App. A-23 to A-24). Judge Higginbotham dissented. He was of the view that petitioners' exclusion from a portion of the voir dire could not be deemed harmless (*id.* at A-30 to A-45).

ARGUMENT

1. Petitioners contend (Pet. 8-14) that their exclusion from a portion of the voir dire requires reversal of their convictions. The court below, however, in a carefully reasoned opinion on which we rely, correctly concluded that even if petitioners' exclusion was improper under Rule 43(a) of the Federal Rules of Criminal Procedure, the error was harmless in the particular circumstances of this case. Further review of that decision is not warranted.

Petitioners were present for 80-85% of the voir dire proceedings, during which the trial judge explained the indictment and basic principles of law to the panel and the prospective jurors responded to various questions designed to elicit background information and probe their impartiality (Pet. App. A-4 to A-5). During this time, petitioners had a full opportunity to observe the potential jurors and to weigh their responses to the court's questions. The inquiry that occurred in petitioners' absence dealt only with the issue of the jurors' exposure to pretrial publicity and with requests to be excused from jury service for personal reasons. As the

majority below noted (*id.* at A-7 n.5), many members of the panel knew nothing about the crime and a number of others had only seen headlines concerning it. And those panel members whose responses may (in the dissenting judge's view) have reflected a prejudice against the defense (see *id.* at A-36 to A-37) did not serve on the jury (see *id.* at A-9). Moreover, defense counsel were present and were free to consult with petitioners, both during the voir dire and later, during the actual selection of the jury.

The purpose of the voir dire is to protect the defendant's right to trial by an impartial jury. See *Ristaino* v. *Ross*, 424 U.S. 589 (1976); *Aldridge* v. *United States*, 283 U.S. 308, 311 (1931). Since petitioners have never challenged the impartiality of the jury (see Pet. App. A-19), the court of appeals correctly concluded that in the unique circumstances presented here the exclusion of petitioners from a portion of the voir dire did not require reversal.[3]

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[3]Petitioners contend that the exclusion of a defendant from the voir dire can never be harmless, but the cases on which they rely (Pet. 11-14) do not support that proposition. As the court of appeals noted (Pet. App. A-10 to A-11 n.9), *Lewis* v. *United States*, 146 U.S. 370 (1892), reversed a conviction because the defendant was not present until after the jury had been selected. *Id.* at 375-376. Nor are petitioners aided by the dictum in *Swain* v. *Alabama*, 380 U.S. 202, 219 (1965), that the denial or impairment of peremptory challenges is reversible error. The court below found that petitioners had a full opportunity to exercise their peremptory challenges in the informal strike system that was used at trial (see Pet. App. A-7 to A-8 n.7, A-10, A-20).

Similarly, petitioners' reliance on *United States* v. *Crutcher*, 405 F. 2d 239 (2d Cir. 1968), cert. denied, 394 U.S. 908 (1969), and *United States* v. *Toliver*, 541 F. 2d 958 (2d Cir. 1976), is misplaced. In *Crutcher*, one defendant was a fugitive until the day trial began. His attorney agreed to go forward with jury selection in his absence, and the defendant was not brought to court until the jury had already been impanelled. The court of appeals remanded for a determination whether the defendant had waived his right to be present. 405 F. 2d at 244. *Toliver* involved a defendant's absence, due to illness, from the cross-examination of a witness. In dictum, the court stated that under the reasoning of its decision in *Crutcher*, a rule requiring automatic

Furthermore, the court of appeals expressly directed that, in the future, the district courts within the Third Circuit will be expected to comply fully with Fed. R. Crim. P. 43 and that "conducting a portion of the jury selection proceedings out of the presence of the defendant[] * * * should not be repeated" (Pet. App. A-29; see also *id.* at A-10, A-24 n.24). Consequently, there is no likelihood that this situation will recur and, accordingly, the issue does not require this Court's review.

2. Petitioners also argue (Pet. 14-17) that 18 U.S.C. 2113(a) requires proof that the money was taken directly from a person, not merely that the bank's money was used as ransom under an extortionate scheme such as that employed by petitioners. This Court has recently declined to review a similar claim in *United States* v. *Hackett*, cert. denied, No. 80-5104 (Oct. 14, 1980), and there is no reason for a different result here.

In *Hackett*, as in this case, ransom money for the release of a bank employee was left at a drop site. See *United States* v. *Hackett*, 623 F. 2d 339, 344 (4th Cir.), cert. denied, No. 80-5104 (Oct. 14, 1980). The court of appeals rejected the defendant's claim that this evidence failed to show an attempt to take money "from the person or presence of another" (*id.* at 345). See also *Brinkley* v. *United States*, 560 F. 2d 871, 873 (8th Cir.), cert. denied, 434 U.S. 941 (1977), where an identical claim was rejected when money was dropped at a specific location pursuant to a caller's threat to blow up the bank manager's home unless ransom money was provided. Accord, *United States* v. *Beck*, 511

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reversal "might" be justified "when a defendant has been denied his right to participate in the jury selection process." 541 F. 2d at 964. But petitioners were not denied that right, for they were free to consult with counsel about what occurred during the anteroom voir dire, and they were present for the remaining 80-85% of the voir dire as well as the actual selection of the jury.

F. 2d 997 (6th Cir. 1975); *United States* v. *Marx*, 485 F. 2d 1179 (10th Cir. 1973).[4]

Contrary to petitioners' claim (Pet. 15), the Ninth Circuit has not taken a conflicting position. In *United States* v. *Culbert*, 548 F. 2d 1355 (9th Cir. 1977), rev'd on other grounds, 435 U.S. 371 (1978), on remand, 581 F. 2d 799 (1978), the Ninth Circuit vacated a conviction for attempted bank robbery on facts similar to those in the instant case. In *Culbert*, however, the government had conceded (548 F. 2d at 1356) that an essential element of bank robbery is a "trespassory taking from the person or presence of [another]." The government subsequently disavowed that concession as unauthorized and as not reflecting the position of the Department of Justice. On review of the Ninth Circuit's decision, this Court "express[ed] no view" as to the correctness of the court of appeals' ruling on that issue. 435 U.S. at 372 n.1. In subsequent decisions, however, the Ninth Circuit has recognized the applicability of the bank robbery statute to situations similar to that presented here. See, *e.g.*, *United States* v. *Snell*, 592 F. 2d 1083 (9th Cir. 1979); *United States* v. *Snell*, 550 F. 2d 515, 517-518 (9th Cir. 1977). Cf. *United States* v. *LaBinia*, 614 F. 2d 1207 (9th Cir.), cert. denied, 446 U.S. 969 (1980). Accordingly, petitioners' claim of an inter-circuit conflict on this issue is unfounded.

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[4]In an attempt to distinguish *United States* v. *Marx*, *supra*, petitioners appear to argue (Pet. 16-17) that there was insufficient evidence in this case to show that they intended to obtain money from the bank. But the record shows that petitioner Lacognata fully understood that Dedrick was going to secure the requested money from the bank, not from his personal funds. Thus, Dedrick first complained that the "bank vault" did not contain $150,000, and later he told Lacognata that the bank did not have $300,000 (C.A. App. 227a, 289a-290a). On the basis of this evidence, the court of appeals properly rejected petitioners' claim that there was insufficient evidence of their intent to steal from a bank (see Pet. App. A-27 to A-28).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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